Petition

81-768

Case Number:

SUPREME COURT OF THE UNITED STATES

October Term 1981

Office-Supreme Court, U.S.
FILED
1981
OCT 20 1981
ALEXANDER L. STEVAS,
CLERK

BENJAMIN PACHKOFSKY,

Plaintiff-Petitioner,

vs.

THE STATE OF OREGON by and through THE PORT OF PORTLAND, LLOYD ANDERSON, Executive Director; THE PUBLIC EMPLOYEES RETIREMENT SYSTEM; and WILLIAM HOLTSCLAW, GLEN HAWKINS, CONSTANCE JARVIS, JAN CLEMMER, and ROGER S. MEIER, as members of the Public Employees Retirement Board,

Defendant-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

B. B. BOUNEFF
BOUNEFF, MULLER & MARSHALL
The Logus Building
529 S. E. Grand Avenue
Portland, Oregon 97214
Attorneys for Plaintiff-Petitioner

DAVID FROHNMAYER, Attorney General
WILLIAM HOELSCHER, Assistant Attorney General and Counsel
100 State Office Building
Salem, Oregon 97310
Attorneys for Defendant-Respondents

QUESTIONS PRESENTED FOR REVIEW

1. DID THE COURT OF APPEALS ERR WHEN IT FOUND THE CHALLENGED LEGISLATION ESTABLISHING THE FAVORED CLASSES OF POLICE OFFICERS, FIRE FIGHTERS AND LEGISLATORS BORE A RATIONAL RELATION TO LEGITIMATE STATE PURPOSES, AND SO NOT A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, WHEN THE LEGISLATIVE RATIONALE OF INCREASING RETIREMENT BENEFITS TO THESE FAVORED CLASSES ON THE BASIS OF CLASS MEMBERS HAVING SHORTER WORKING LIVES THAN OTHER GOVERNMENT EMPLOYEES IS ENTIRELY INCONSISTENT WITH ITS RATIONALE FOR INCLUDING CERTAIN OTHER DISTINGUISHABLE OCCUPATIONAL GROUPS IN THE FAVORED CLASSES?

2. DID THE COURT OF APPEALS ERR WHEN IT FOUND THE CHALLENGED LEGISLATION ESTABLISHING THE FAVORED CLASSES OF POLICE OFFICERS, FIRE FIGHTERS AND

LEGISLATORS BORE A RATIONAL RELATION TO LEGITIMATE STATE PURPOSES, AND SO NOT A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, WHEN THE LEGISLATIVE RATIONALE OF INCREASING RETIREMENT BENEFITS TO THESE FAVORED CLASSES ON THE BASIS OF CLASS MEMBERS HAVING SHROTER WORKING LIVES THAN OTHER GOVERNMENT EMPLOYEES HAS NO BASIS IN FACT AND IS IN ADDITION INCONSISTENT WITH THE STATUTORY PROVISO ALLOWING CLASS MEMBERS TO WORK PAST RETIREMENT?

TABLE OF CONTENTS

	Page
Reference to the Official and Unofficial Reports of any Opinions Delivered Below	1
Jurisdictional Statement	1
Judgment to be Reviewed.	2
Jurisdictional Statute	2
Statutes which the Case Involves	2
Statement of the Case.	3
Issue Number One and Argument. .	12
Issue Number Two and Argument. .	23
Conclusion	26

TABLE OF AUTHORITIES

Cases

Bullock v. Carter, 405 U.S. 134 (1972)	15
Dandridge v. Williams, 387 U.S. 471 (1970)	13,16, 17
Department of Agriculture v. Moreno, 413 U.S. 528 (1973). . .	17,18

Eisenstadt v. Baird, 405 U.S. 438 (1972) 17,18

Frontiero v. Richardson, 411 U.S. 677 (1973) 15,16

Jimenez v. Weinberger, 417 U.S. 628 (1974) 17

Lindsley v. National Carbonic Gas Co. 220 U.S. 61 (1911) . . . 14

Massachusetts Board of Retirement v. Murgia 427 U.S. 307 (1976). . 21

New Orleans v. Dukes, 427 U.S. 297 (1976) 14

Smith v. Cahoon, 283 U.S. 553 (1931) 15,22

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). 15,16

Williamson v. Lee Optical Co. 348 U.S. 483 (1955). 15

Constitutional Provisions

United States Constitution Fourteenth Amendment 1,10, 11,12, 23

Statutes

United States Code

28 U.S.C. § 1254 2

28 U.S.C. § 1291 2

28 U.S.C. § 1331 10

Oregon Revised Statutes

O.R.S. 237.001 to 237.315. . . . 4

O.R.S. 237.003(7). 4

O.R.S. 237.003(11) 8,20

O.R.S. 237.003(13) 9,20

O.R.S. 237.011 3

O.R.S. 237.121 6

O.R.S. 237.129 6

O.R.S. 237.133(1). 8,25

O.R.S. 237.147 5,6,10

O.R.S. 237.147(2). 5

O.R.S. 237.251 4

Appendix I

Memorandum, United States Court of Appeals for the Ninth Circuit 1

Appendix II

Opinion, United States District Court for the District of Oregon 1

Judgment, United States District Court for the District of Oregon 14

Appendix III

United States Constitution, 14th Amendment 1

28 U.S.C. § 1254 1

O.R.S. 237.003(7). 2

O.R.S. 237.003(11) 3

O.R.S. 237.003(13) 5

O.R.S. 237.011 5

O.R.S. 237.121 22

O.R.S. 237.129 23

O.R.S. 237.133(1). 25

O.R.S. 237.147 29

O.R.S. 237.147(2). 29

O.R.S. 237.251 34

REFERENCE TO THE OFFICIAL/UNOFFICIAL REPORTS OF ANY OPINIONS DELIVERED BELOW

Opinion below not reported (see App. I).

JURISDICTIONAL STATEMENT

Plaintiff-Petitioner appeals from a judgment by the United States Court of Appeals for the Ninth Circuit, affirming a decision of the United States District Court for the District of Oregon. The decision of the Court of Appeals was filed and entered on 22 July 1981.

The District Court dismissed Plaintiff's claim for an injunction prohibiting defendants from continuing practices which violate the Equal Protection Clause of the Fourteenth Amendment and the Due Process clause of the Fourteenth Amendment. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00. The Court of Appeals had jurisdiction to review the

District Court's decision by virtue of 28 U.S.C. § 1291. This Court's jurisdiction is based on 28 U.S.C. §1254(1), allowing any civil case in the Court of Appeals to be reviewed by the Supreme Court by Writ of Certiorari.

JUDGMENT TO BE REVIEWED

The opinion below was entered on

22 July 1981

JURISDICTIONAL STATUTE

28 U.S.C. § 1254(1)

STATUTES WHICH THE CASE INVOLVES

United States Constitution

Fourteenth Amendment

United States Code

28 U.S.C. § 1254

28 U.S.C. § 1291

28 U.S.C. § 1331

Oregon Revised Statutes

O.R.S. 237.001 to 237.315

O.R.S. 237.003(7)

O.R.S. 237.003(11)

O.R.S. 237.003(13)

O.R.S. 237.011

O.R.S. 237.121

O.R.S. 237.129

O.R.S. 237.133(1)

O.R.S. 237.147

O.R.S. 237.147(2)

O.R.S. 237.251

STATEMENT OF THE CASE

Petitioner is a 57 year old former employee of the Port of Portland where he was employed as an electrician (CR 41, p. 1; CR 51). Petitioner is a retired employee member of PERS who was required to be a member as a condition of his former employment, by O.R.S 237.011 (CR unnumbered, p. 3 - stipulated pretrial order, signed by the parties but unsigned

by the magistrate, dated 19 June 1978. Hereafter referred to as CR of 19 June 1978).

The Port of Portland is a public employer as defined by O.R.S. 237.003(7) and a participant in the Public Employees Retirement System (PERS) (CR of 19 June 1978, p. 2). As an employer member of the Retirement System, the Port of Portland periodically transmits to the Public Employees Retirement Board such amounts actuarily computed to be necessary to provide life pension benefits for the life of eligible retired employees as the Board deems adequate to comply with O.R.S. 237.001 to O.R.S. 237.315 (CR of 19 June 1878, p. 3). The Public Employees Retirement Board is charged by O.R.S. 237.251 with the administration of the Public Employees Retirement System (CR of 19 June 1978, p. 2).

Upon retirement, an employee member of the Retirement System is entitled to receive a service retirement allowance consisting of the annuities and pensions set forth in O.R.S. 237.147. Under O.R.S. 237.147(2), the "life pension" portion of the allowance is funded by contributions made by the employer to the retirement system (CR of 19 June 1978, p. 3). Employer contributions to the "life pension" portion of the service retirement allowance are made based on a percentage of total payroll without regard to an individual employee's job title or any employee's identity (CR of 19 June 1978, p. 3).

Monthly retirement benefits payable under the "life pension" portion of the service retirement allowance are 35 percent higher for policemen, firemen and legislators than for all other public

employees with equal years of service, age and final average salary. O.R.S. 237.147 (CR of 19 June 1978, p. 4). Under O.R.S. 237.129 retirement is compulsory for policemen and firemen at age 60, whereas for other employees retirement is not compulsory until age 65. Under O.R.S. 237.121 firemen and policemen may voluntarily retire "early" at age 55 without actuarial reduction, whereas all other employees, including legislators, may not voluntarily retire without actuarial reduction until age 60. Policemen and firemen may voluntarily retire at age 50 with actuarial reduction; all other employees may retire at age 55 with actuarial reduction (CR of 19 June 1978, p. 4).

The legislative purpose in granting the 135 percent benefit rate to policemen and firemen was to supplement reduced

pension due to a shorter working life under an age 60 compulsory retirement as opposed to age 65 for other employees (Minutes, Joint Ways and Means Committee of the 56th Legislative Assembly of 1971 relating to HB1849--CR 45, p. 2; CR 45, p. 4 and 5).

PERS statistics indicate that the average police and fire employee nearing retirement age served more years than the average general service employee of the same age and has also served more years than the average general service employee who is five (5) years older (CR 46, pp. 8-11). In addition, a higher percentage of police and fire employees nearing retirement age than their general service counterparts of the same age or five (5) years older have served twenty (20) to thirty (30) years (CR 46, pp. 8-11). Police officers and firemen may, under

certain conditions, continue to work for their employees past the mandatory retirement age. O.R.S. 237.133(1). Any employee who does so will still, upon retirement, receive benefits calculated using the 135 percent rate (CR of 19 June 1978, p. 4).

In 1975, the legislature widened membership in the classifications of police officers and fire fighters to include respectively Oregon Liquor Control Commission enforcement officers, police chiefs, parole and probation officers, Capital Building police officers, airport police, livestock police and employees of the Board on Police Standards and Training as police officers (O.R.S. 237.003(11)) and the State Fire Marshall, Chief Deputy State Fire Marshall, deputy state fire marshalls and employees of the Fire Standards

Accreditation Board as fire fighters (O.R.S. 237.003(13)). These groups were classified as police officers and fire fighters because they work in tangentially related fields and their superiors sought to avoid professional jealousy between these groups and "real policemen" (Minutes, Senate State and Federal Affairs Committee, Subcommittee on Retirement, 18 March 1975, CR 57, p. 13).

In 1975, the Legislative Assembly granted the 135 percent benefit rate to legislator members of PERS based upon the fact that they also had potentially shorter working lives than normal public employees due to their ultimate defeat at the polls (Minutes, Joint Ways and Means Committee, dated 11 April 1975, relating to SB351--CR 45, p. 17).

Petitioner brought an action in U. S. District Court for the District of Oregon

for an injunction prohibiting defendants from continuing practices allegedly violative of the Equal Protection Clause of the Fourteenth Amendment and the due process clause of the Fourteenth Amendment, for declaratory relief and for damages (CR 1). Specifically, petitioner claimed the section of the Public Employees Retirement System, O.R.S. 237.147 (Appendix III), wherein monthly retirement benefits payable under the "life pension" portion of the service retirement allowance are thirty-five percent higher for policemen, firemen and legislators than for all other public employees with equal years of service, age and final average salary, violated petitioner's rights to equal protection under the Fourteenth Amendment and to due process under the Fourteenth Amendment. Jurisdiction was under 28 U.S.C. § 1331.

Defendants moved to dismiss the claim for damages and the lower court granted the defendant's motion (CR 15, 20, 21).

The parties stipulated that this case could be decided with finality by a United States Magistrate and agreed to submit the case on the briefs and the record in lieu of a trial (CR of 19 June 1978; CR 39).

Defendant in the lower court obtained a judgment dismissing petitioner's claim on the basis that the statute in question bore a rational relation to a legitimate state purpose (CR 58, p. 6; CR 59; CR 60).

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit, on the basis that the District Court erred in failing to find a violation of the Fourteenth Amendment, in that the legislative rationale was internally inconsistent and in addition that the

legislative rationale had no basis in fact. The Court of Appeals affirmed the District Court decision.

Petitioner now petitions this court for a Writ of Certiorari.

ISSUE NO. ONE AND ARGUMENT

DID THE COURT OF APPEALS ERR WHEN IT FOUND THE CHALLENGED LEGISLATION ESTABLISHING THE FAVORED CLASSES OF POLICE OFFICERS, FIRE FIGHTERS AND LEGISLATORS BORE A RATIONAL RELATION TO LEGITIMATE STATE PURPOSES, AND SO NOT A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, WHEN THE LEGISLATIVE RATIONALE OF INCREASING RETIREMENT BENEFITS TO THESE FAVORED CLASSES ON THE BASIS OF CLASS MEMBERS HAVING SHORTER WORKING LIVES THAN OTHER GOVERNMENT EMPLOYEES IS ENTIRELY INCONSISTENT WITH ITS RATIONALE FOR INCLUDING CERTAIN OTHER DISTINGUISHABLE OCCUPA-

TIONAL GROUPS IN THE FAVORED CLASSES?

The discrimination between the favored classes of policemen, firemen and legislators and petitioner is irrational because the legislative rationale of increasing benefits to the favored affected classes on the basis of class members having shorter working lives than other government employees is entirely inconsistent with its rationale for including certain distinguishable occupational groups in the favored classes merely to avoid professional jealousy.

The trial court erred in its application of the rational basis test in not focusing on the actual relationship between the stated legislative purpose and the statutory scheme, but rather applying the looser test of Dandridge v. Williams, 397 U.S. 471, 485 (1970), in finding "a rational relation to legiti-

mate state purposes based on the alleged state purposes of attracting and keeping qualified personnel and assuring a decent retirement income for those employees" as well as the stated purpose of adding to the pension of employees with shorter working lives (CR 58, p. 6).

Petitioner agrees that the appropriate standard for the Court to apply is the rational basis test. Absent a suspect classification or a violation of a fundamental interest, the case law is clear that the statutory discrimination is presumed to be constitutional and must only be rationally related to a legitimate state interest, e.g. New Orleans v. Dukes, 427 U.S. 297, 303 (1976). Classifications having some rational basis need not be mathematically precise. Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 78 (1911). Regulation may proceed to

remedy a problem one step at a time. Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

However, the classification must be based on differences reasonably related to the legislative purpose. Bullock v. Carter, 405 U.S. 134, 145 (1972), Smith v. Cahoon, 283 U.S. 553, 567 (1931). In Weinberger v. Wiesenfeld, 420 U.S. 636, 648-653 (1975), the Supreme Court relied on the articulated purpose as it emerged from the statutory scheme and from legislative history. J. Brennen went on to state:

> This Court need not in equal protection cases accept at face value assertions of legislative purposes when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation. id. at 525, fn 16.

Going well beyond the prior strict scrutiny standard for sex discrimination applied in Frontiero v. Richardson, 411

U.S. 677, 688 (1973), Weinberger also implicitly narrows the decision of Dandridge v. Williams, which had held that statutory discrimination will not be set aside for violation of the equal protection clause if any state of facts may reasonably be conceived to justify it. Dandridge v. Williams, supra, 397 U.S. at 485.

Although Weinberger, supra, and Frontiero, supra, were both cases of sex discrimination, the Weinberger rule does not apply only to sex discrimination cases. As J. Brennan points out in Weinberger, supra, 420 U.S. at 525, fn 16, there is ample support for the rule that in equal protection cases,

> this Court need not in equal protection cases accept at fact value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.

Citing Eisenstadt v. Baird, 405 U.S. 438, 448-452 (1972), Jimenez v. Weinberger, 417 U.S. 628, 634 (1974) and Department of Agriculture v. Moreno, 413 U.S. 528, 536-537 (1973).

Moreno, supra, dealt with a provision of the federal food stamp program denying benefits to households composed of unrelated persons. The classification was found to be in fact not rationally related to the state interest in minimizing fraud. id. 413 U.S. at 537.

Jimenez, supra, likewise dealt with a federal welfare program, a provision of the Social Security Act, denying benefits to some but not all illegitimate children. C. J. Burger refused to apply strict scrutiny and also refused to apply the 'special deference' standard of Dandridge, supra. Distinguishing the Dandridge standard as due to the problem

of the finite sources available for welfare benefits, Moreno, supra, 397 U.S. at 633, here there was no evidence of a significant effect on the federal Social Security trust fund if the excluded class was included, id. 397 U.S. at 633-634. Rather, since the purpose was to prevent fraud, the two classes were not rationally distinguishable, and so denial of benefits to one class was a denial of equal protection. id. 397 U.S. at 637. (In this case, also, petitioner's requested relief will not result in any increased burden on state funds, since petitioner's complaint requested only declaratory and injunctive relief of future unconstitutional treatment.)

In Eisenstadt, supra, the Court again looked at the actual, not hypothetical, purposes--regulating sexual relations, health and prohibiting contraception--of

a state statute controlling distribution of contraceptives to the classes of unmarried and married persons. id. 405 U.S. at 448-450. All three purposes were found to be irrational. id. 405 U.S. at 447-455.

In this case, the avowed purpose of the legislation, according to the legislative history (CR 45), and to Defendant's Trial Memorandum (CR 55, p. 26), is to provide increased benefits to the favored classes of policemen, firemen and legislators on the common ground that they all had shorter working lives than other government employees, for police officers and fire fighters due to mandatory early retirement. Mandatory early retirement in turn is based on a legislative judgment that police work and firefighting demand younger persons (CR 45, p. 23).

Upon close analysis, it appears that

this cannot be the real purpose. The classes of police officers and of fire fighters respectively are not homogeneous but include in addition to the traditional members of the respective class, various other state employees. Firefighters include the State Fire Marshall, Chief Deputy State Fire Marshall, deputy state fire marshalls and Addreditation Board as well as traditional fire fighters, O.R.S. 237.003(13). Police officers include Oregon Liquor Control Commission enforcement officers, police chiefs, parole and probation officers Capital Building police officers, airport police, livestock police and employees of the Board on Police Standards and Training, O.R.S. 237.003(11). Few, if any, of these face the same or similar demands as traditional police officers of fire fighters. They were classified as police officers

or fire fighters for purposes of PERS because they work in tangentially related fields and simply to avoid professional jealousy between them and 'real policemen' they were classified as police officials merely because they work in tangentially related fields and their superiors sought to avoid professional jealousy between these groups and 'real policemen' (Minutes, Senate State and Federal Affairs Committee, Subcommittee on Retirement, 18 March 1975 (CR 57, p. 13).

The purpose of mandatory early retirement for police officers and fire fighters is rational, e.g. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 314-316 (1976). However, inclusion of others in the favored groups based not on any legislative finding of equivalence in work and work demands but only on a mere desire to avoid professional jeal-

ousy, is not rationally related to the legislative purpose of supplementary compensation for those whose work requires mandatory early retirement. It is particularly irrational to exclude general service employees, even though their work may be of comparable danger to that of the traditional police officer of fire fighter, while including others merely to avoid professional jealousy, with no consideration of the comparable nature of their work. The legislative purpose, of protecting the public by early retirement of police officers and fire fighters and subsequently supplementing their retirement compensation, can't support inclusion of other groups merely to avoid professional jealousy. "Such a classification is not based on anything having relation to the purpose for which it is made." Smith v.

Cahoon, supra, 283 U.S. at 567.

ISSUE NO. TWO AND ARGUMENT

DID THE COURT OF APPEALS ERR WHEN IT FOUND THE CHALLENGED LEGISLATION ESTABLISHING THE FAVORED CLASSES OF POLICE OFFICERS, FIRE FIGHTERS AND LEGISLATORS BORE A RATIONAL RELATION TO LEGITIMATE STATE PURPOSES, AND SO NOT A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, WHEN THE LEGISLATIVE RATIONALE OF INCREASING RETIREMENT BENEFITS TO THESE FAVORED CLASSES ON THE BASIS OF CLASS MEMBERS HAVING SHROTER WORKING LIVES THAN OTHER GOVERNMENT EMPLOYEES HAS NO BASIS IN FACT AND IS IN ADDITION INCONSISTENT WITH THE STATUTORY PROVISO ALLOWING CLASS MEMBERS TO WORK PAST RETIREMENT?

The discrimination between the favored classes of policemen, firemen and legislators and petitioner is irrational because

the legislative rationale of increasing benefits to these favored classes on the basis of class members having shorter working lives than other government employees has no basis in fact.

As discussed earlier, the legislative purpose is to provide supplementary compensation to the favored classes of police officers, fire fighters and legislators, because they have shorter working lives than general schedule employees, the latter due to the vagaries of elections, the former two due to mandatory early retirement. Also as discussed earlier, review in an equal protection case such as this should be confined to the actual legislative purposes, and not to hypothetical purposes.

The state rationale here is fallacious, because based on a false premise. PERS statistics indicate that early

mandatory retirement does not in fact result in fewer years of service for police and fire employees than for general service employees (CR 46, pp. 8-11).

The average police and fire employee at retirement has more years of service than the average general service employee of the same age and more years of service than the average general service employee who is five years older (CR 46, pp. 8-11).

Moreover, the structure of the retirement system is not rationally related to the legislative purpose. Police officers and firemen may, under certain conditions, continue to work past the otherwise mandatory retirement age, O.R.S. 237.133(1). Those who do so still receive benefits at retirement based on the 135 percent rate, despite there being no longer a rational basis for the supplement to their pension based on a shorter working life due to

early retirement. While admittedly, mathematical precision is not required for rationality, more is required than a demonstrably false premise and a scheme of application which is patently inconsistent even with that premise.

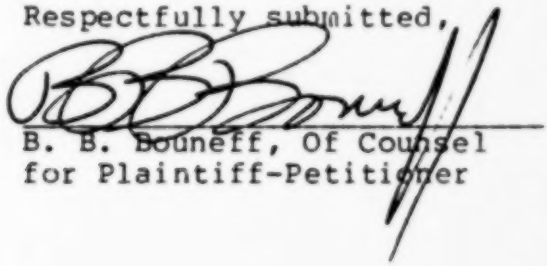
In view of this, under the authorities discussed previously, the trial court erred in finding that the statute in question bears a rational relation to a legitimate state purpose.

CONCLUSION

It is respectfully submitted that the Court of Appeals erred when it found the challenged regulation bore a rational relation to a legitimate state purpose. Petitioner proposes that the record shows that the challenged statute is both internally inconsistent with the stated legislative purpose and based upon a demonstrably false premise as well.

Under these circumstances, Petitioner requests this Court to reverse the Court of Appeals and find for the Petitioner.

Respectfully submitted,



B. B. Bouneff, Of Counsel
for Plaintiff-Petitioner

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BENJAMIN PACHOFSKY, Plaintiff-Appellant, vs. THE STATE OF OREGON, by and through THE PORT OF PORTLAND; LLOYD ANDERSON, Executive Director, THE PORT OF PORTLAND; and WILLIAM HOLTSCLAW, GLEN HAWKINS, CONSTANCE JARVIS, JAN CLEMMER and ROBERT S. MEIER, as members of the PUBLIC EMPLOYEES RETIREMENT BOARD, Defendants-Appellees.	No. 79-4861 D.C. Civil No. 77-79 MEMORANDUM FILED July 22, 1981

On Appeal from the United States
District Court
for the District of Oregon
The Honorable Robert C. Belloni,
Presiding
Argued and submitted June 9, 1981

Before: ANDERSON, HUG, and POOLE, Circuit Judges.

We affirm the holding of the district court that the allocation of greater retirement benefits to a class of retired

state employees consisting of former police officers, firemen, and state legislators than are afforded other retired state employees under ORS 237.147 does not violate Pachofsky's right to equal protection of the laws.

Pachkofsky concedes that the "rational relationship" analysis is approprite to this case. Under the "rational relationship" test, a classification having a reasonable basis is upheld even if the classification is imperfect or results in some inequality in practice. Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970). We will not overturn a classification "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions

were irrational." Vance v. Bradley, 440 U.S. 93, 97, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979). We may look beyond the articulated purpose of a classification, and we may even hypothesize the legislature's motivation to find a legitimate objective. Lamb v. Scripps College, 627 F.2d 1015, 1021, n.9 (9th Cir. 1980).

Pachkofsky first attacks the rationality of the statute on the ground that the statutory definitions of "police officer" and "firefighter" include individuals who do not perform duties strictly confined to traditional law enforcement and firefighting functions, respectively, and who do not face the full range of personal safety hazards routinely faced by persons in those professions. We do not find that inclusion of these added categories

renders the classification irrational.

The Oregon legislature could legitimately promote the recruitment of qualified personnel to fill public safety positions. Under ORS 237.129, police officers and firefighters face cumpulsory retirement at age 60, whereas other employees were not, at the time Pachkofsky's complaint was filed, required to retire until they reached age 65. All employees who meet the statutory definition of "police officer" or "fire fighter" are also bound by the age 60 retirement deadline. The legislature could reasonably find that the shorter potential working life of firefighters and police officers was a possible detriment to recruitment of qualified personnel, and that an increase in retirement benefits consequently was necessary as a recruitment inducement.

Inclusion of the class of employees who performed some non-traditional functions was not irrational. These employees, by definition, also must retire by age 60. They face varying degrees of personal hazards in the performance of their duties. The state has a legitimate interest in recruiting qualified applicants for these posts as well. It also has an interest in promoting professional pride among the ranks of this expanded class of public safety employees, and application of identical retirement standards to these employees as are applied to employees engaged in traditional law enforcement and fire-fighting duties would be rationally related to that goal.

Pachkofsky's second objection to the classification is that it is not supported by certain statistical evidence

which tends to indicate that police officers and fire fighters in Oregon actually enjoy longer working lives than other public employees. Much of what we have already said goes to this argument as well. The potential for a shorter working life justifies the classification, both in terms of recruitment and compensation. We do not find that the statistical experience of other employees whose entry into and departure from the public sector may be influenced by a variety of factors unrelated to compulsory retirement invalidates the classification.

We also do not find that the inclusion of state legislators in the class of employees entitled to added retirement benefits is irrational. The working lives of legislators are constantly endangered by the normal

shifting of constituent sentiment. We also note that if ever there was possibly unwise classification which can be remedied through the political process, this would be it.

We emphasize that we are not concerned with the wisdom of what the Oregon legislature has done, but only with its constitutionality. The legislature may allocate the scarce resources of its public employment retirement program in any manner it may see fit so long as minimum standards of constitutionality are observed. Those standards have not been transgressed here.

The judgment of the district court is AFFIRMED.

PACHOFSKY v. OREGON, No. 79-4861

Dissenting in part and Concurring in part:

POOLE, Circuit Judge:

I concur in the conclusion reached by the majority that giving higher retrement benefits to police officers and firefighters facing mandatory retirement at age 60 is rationally related to a legitimate state purpose. However, I cannot agree that members of the legislature are entitled to the same benefits simply because their political life may be shortened by the voting public.

A statute requiring varying treatment among different groups will not be overturned unless it is so unrelated to the achievement of any combination of legitimate purposes that the legislature's act must be deemed

irrational. Vance v. Bradely, 440 U.S. 93, 97 (1979). The state has argued, and I would agree, that the higher beneifts are necessary to induce qualified persons into becoming firefighters and policemen as the rigors of the jobs and the mandatory retirement age present a shorter potential working life than exists for other state employees. This rationale does not support awarding higher benefits to the legislators because they are not compelled to retire early (except as the electorate may choose) or to perform hazardous duties. Thus, the state's argument for inclusion of the legislaturors is simply the possibility of a shorter work life.

All candidtates for public office enter the political arena with foreknowledge of their dependency upon the thermal currents of politics. For

whatever period of service, their office is no stronger or more secure than the prevailing wish of those whom they represent. There appears no rational reason justifying higher retirment benefits to legislators simply because the voters may exercise their perogatives unfavorably to an incumbent. An adverse verdict at the polls is not comparable to the cumpulsdory retiement imposed by law.

I find the inclusion of the legislators in the higher retirement benefit plan to be both irrational and an unjustifiable effort to insulate themselves from the choice of the voters. Accordingly, I must dissent from such a preference which I deem not merely "possibly unwise," as the majority has suggested, but constitutionally impermissible.

APPENDIX II

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BENJAMIN PACHKOFSKY, Plaintiff-Appellant, vs. THE STATE OF OREGON by and through THE PORT OF PORTLAND, LLOYD ANDERSON, Executive Director; THE PUBLIC EMPLOYEES RETIREMENT SYSTEM; and WILLIAM HOLTSCLAW, GLEN HAWKINS, CONSTANCE JARVIS, JAN CLEMMER, and ROGER S. MEIER, as members of the Public Employees Retirement Board, Defendant-Respondents.	)	CIVIL NO. 77-79 OPINION Filed: 11/21/79

John Chally
Bouneff, Muller & Marshall
516 S. E. Morrison, #500
Portland, Oregon 97214
Attorney for the plaintiff

Timothy D. Norwood
Assistant Attorney General
100 State Office Building
Salem, Oregon 97310
Attorney for defendants

LEAVY, Judge:

Plaintiff brings this action for an

injunction prohibiting defendants from continuing practices allegedly violative of the Equal Protection Clause of the Fourteenth Amendment and the due process clauses of the Fifth and Fourteenth Amendments. Jurisdiction is alleged under 28 U.S.C. § 1331.

Specifically, plaintiff attacks the constitutionality of that section of the Public Employes Retirement System, ORS 237.147 [see Appendix III], wherein monthly retirement benefits payable under the "life pension" portion of the service retirement allowance are thirty-five percent higher for policemen, firemen and legislators than for all other public employes with equal years of service, age and final average salary.

The parties have stipulated that this case can be decided with finality by a United States Magistrate. Additionally,

the parties have agreed to submit the case on the briefs and the record in lieu of a trial.

JURISDICTION

Plaintiff asserts jurisdiction under the federal question statute. 28 U.S.C. § 1331. That statute requires an amount in controversy of $10,000. Plaintiff requested damages of $52,977 in his complaint, but this court subsequently granted defendants' motion to dismiss as to the damage claim. Only the requests for injunctive and declaratory relief remain. Suits contesting the constitutionality of state statutes require satisfaction of the $10,000 jurisdictional amount requirement. In actions seeking declaratory or injunctive relief, the amount in controversy is measured by the value of the object of the litigation. Hunt v. Washington Apple

Advertising Commission, 432 U.S. 333, 347 (1977). Here, the object of the litigation is an increased pension benefit for the plaintiff, which would exceed $10,000.

FINDINGS OF FACT

1. Plaintiff is a 57 year old former employe of the Port of Portland.

2. The Port of Portland is a public employer as defined by ORS 237.003(7) and a participant in the Public Employes Retirement System (PERS).

3. The Public Employes Retirement Board is charged by ORS 237.251 with the administration of the Public Employes Retirement System.

4. As an employer member of the Retirement System, the Port of Portland periodically transmits to the Public Employes Retirement Board such amounts actuarily computed to be necessary to

provide life pension benefits for the life of eligible retired employes as the Board deems adequate to comply with ORS 237.001 to ORS 237.315.

5. Plaintiff is a retired employe member of PERS who was required to be a member as a condition of his former employment by ORS 237.011.

6. Upon retirement, an employe member of the Retirement System is entitled to receive a service retirement allowance consisting of the annuities and pensions set forth in ORS 237.147. Under ORS 237.147(2), the "life pension" portion of the allowance is funded by contributions made by the employer to the retirement system.

7. Employer contributions to the "life pension" portion of the service retirement allowance are made based on a percentage of total payroll without

regard to an individual employe's job title or any employe's identity.

8. Monthly retirement benefits payable under the "life pension" portion of the service retirement allowance are 35 percent higher for policemen, firemen and legislators than for all other public employes with equal years of service, age and final average salary. ORS 237.147.

9. Plaintiff was employed as an electrician by the Port of Portland.

10. Under ORS 237.129 retirement is compulsory for policemen and firemen at age 60, whereas for other employes retirement is not compulsory until age 65. Under ORS 237.121 firemen and policemen may voluntarily retire "early" at age 55 without actuarial reduction, whereas all other employes, including legislators, may not voluntarily retire without actuarial reduction until age

60. Policemen and firemen may voluntarily retire at age 50 with actuarial reduction; all other employes may retire at age 55 with actuarial reduction.

11. The legislative purpose in granting the 1.35 percent benefit rate to policemen and firemen was to offset the relatively shorter potential working life such employes would experience under an age 60 compulsory retirement as opposed to age 65 for other employes. The legislature also considered special benefits for policemen and firemen to be part of a compensation package which provided substantial improvement to the economic security of police and fire employes.

12. In 1975, the Legislative Assembly granted te 1.35 percent benefit rate to legislator members of PERS based

upon the fact that they also had potentially shorter working lives than normal public employes due to their ultimate defeat at the polls.

13. The state legislature constitutes an identifiable homogeneous group of employes with short service and low compensation. These two factors constitute the basis for the 1.35 percent benefit rate for legislators. The purpose is to attract more qualified persons to the legislature.

14. If the benefits for all general service employes were increased by using the 1.35 percent benefit rate, the total employer contributions to the PERS would have to be substantially increased.

15. Plaintiff did not meet his burden of showing that the occupation of an electrician is more hazardous than that of a fireman or a policeman.

DISCUSSION AND CONCLUSIONS

Plaintiff alleges that the PERS violates his right to Equal Protection of the law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. A state cannot function without classifying its citizens for various purposes and treating some differently than others. It is the function of the court to determine whether the classifications drawn are reasonable in light of their purpose. McLaughlin v. Florida, 379 U.S. 184, 191 (1964). When no suspect classifications have been drawn and no fundamental interests have been infringed, the statute must simply bear a rational relation to a legitimate governmental interest. McGowan v. Maryland, 366 U.S. 420 (1951). Since the legislative action in this case falls within the area of

economics and social welfare, the appropriate test to use in evaluating its constitutionality is the rational basis test. Dandridge v. Williams, 397 U.S. 471, 485 (1970).

This Court finds that the challenged legislation bears a rational relation to legitimate state purposes. The legislature has determined that those public employes with relatively short working lives should be compensated by a slightly higher percentage base for the life benefit portion of their pension. Such increased benefit furthers the legitimate state purposes of attracting and keeping qualified personnel, and assuring a decent retirement income for those employes. While it may be that there are other public employes who, for various reasons, might also be deserving of an increased pension, in the area of

economics and social welfare a statute does not violate Equal Protection merely because the classifications made are imperfect. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). If the classification has some rational basis it does not offend the Constitution simply because it "is not made with mathematical nicety or because in practice it results in some inequality." Id.

The challenged state statutes are, at most, under-inclusive. Under-inclusion by itself is not a denial of Equal Protection; the state may select one phase of a field and apply a remedy there, neglecting the others. Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955). To require that the state remedy all aspects of a particular mischief or none at all might preclude a state from undertaking any program at all until its

resources were adequate to deal with the entire problem. See Buck v. Bell, 274 U.S. 200 (1927). Some sacrifice of equality and fairness may be required in order that the system have the flexibility to evolve new solutions to social problems. Where, as here, the under-inclusive classification confers a benefit upon some, but not all, employes who might arguably be included in the class, the inequality has none of the harmful effects that occur when an under-inclusive classification imposes a burden upon the class.

The Equal Protection Clause does not require that a state choose between attacking every aspect of a problem or not attacking the problem at all. Lindsley v. Natural Carbonic Gas Co., supra. It is enough that the state's action be rationally based and free from

invidious discrimination. Dandridge v. Williams, supra. A solid foundation for the challenged statutes can be found in the state's legitimate interest in providing for a secure retirement for its employes who have a shorter working life; therefore, the statute before us meets the Dandridge test. This court is not empowered to second-guess state officials charged with the difficult responsibility of allocating limited retirement funds among the potential recipients; if the plaintiff should be entitled to relief, he must attain it through the political process. See Gentry v. Uniform Judicial Retirement System, 378 F.Supp. 1 (N.D. N.C. 1974).

Therefore, defendants are entitled to judgment.

Dated this 20th day of November, 1979.

/s/Edward Levy
United States Magistrate

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BENJAMIN PACHKOFSKY, Plaintiff, vs. THE STATE OF OREGON etc. et al, Defendants.	)	CIVIL NO. 77-79 JUDGMENT

This action is dismissed.

Dated: November 21, 1979.

/s/Robert M. Christ
Clerk of Court

APPENDIX III

United States Constitution

14th Amendment

Section 1. Citizenship; privileges and immunities; due process; equal protection. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1254

Cases in the Courts of Appeal may be reviewed by the Supreme Court by the

following methods: (1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;....

O.R.S. 237.003(7)

The term "public employer" means the state, one of its agencies, one of its political subdivisions or an agency created by two or more such political subdivisions to provide themselves governmental services. For purposes of ORS 237.001 to 237.315, such agency created by two or more political subdivisions is a governmental instrumentality and a legal entity with power to enter into contracts, hold property and sue and be sued.

O.R.S. 237.003(11)

The term "police officer" includes:

(a) Employes of the Oregon State Penitentiary and of the Oregon State Correctional Institution whose duties, as assigned by the superintendent, include the custody of persons committed to the custody of or transferred to the penitentiary or correctional institution.

(b) Employes of the Department of State Police who are classified as police officers by the Superintendent of State Police.

(c) Employes of the Oregon Liquor Control Commission who are classified as enforcement officers by the administrator of the commission.

(d) Sheriffs and those deputy sheriffs or other employes of a sheriff whose duties, as classified by the sheriff, are the regular duties of police officers or

corrections officers.

(e) Police chiefs and policemen of a city who are classified as police officers by the council or other governing body of the city.

(f) Parole and probation officers employed by the State Board of Parole and Probation.

(g) Employes of the Department of General Services who are classified as Capitol Building Police Officers by the Director of the Department of General Services.

(h) Employes of the Port of Portland who are classified as Airport Police by the Board of Commissioners of the Port of Portland.

(i) Employes of the State Department of Agriculture who are classified as livestock police officers by the Director of Agriculture.

(j) Employes of the Board on Police

Standards and Training who are classified by the board as other than secretarial or clerical personnel.

O.R.S. 237.003(13)

The term "fireman" includes:

(a) The State Fire Marshall and the chief deputy fire marshall and deputy state fire marshalls appointed under ORS 476.040.

(b) Employees of the Fire Standards and Accreditation Board who are classified by the board as other than secretarial or clerical personnel.

O.R.S. 237.011

Membership generally. No person may become a member of the system unless he is in the service of a public employer and has completed six months' service uninterrupted by a total of more than 30

working days during the six months' period. Every employe of a participating employer shall become a member of the system at the beginning of his first full pay period following the six months' period. All public employers participating in the Public Employes' Retirement System established by chapter 401, Oregon Laws 1945, as amended, at the time of repeal of that chapter, and all school districts of the state, shall participate in, and their employes shall be members of, the system, except as follows:

(1)(a) An employe who is a member of, or eligible for membership in, a retirement system established by a public employer prior to April 8, 1953, or who is a member of, or eligible to membership in, an association established pursuant to ORS chapter 239, may not become a member

of the system established by this chapter until the previously established system or the system of the association is integrated with the system established by this chapter pursuant to the procedure provided by ORS 237.051. As a member of the system established by this chapter he shall receive no credit for service during such time as he heretofore excluded or hereafter excludes himself from the previously established system or from the association, and shall receive only such credit for service during the time he is a member of the previously established system or of the association as the contract of integration provides, except that any teacher who has been continuously employed by a school district of this state from July 1, 1929, to July 1, 1951, in which an association has been established pursuant to ORS

chapter 239, and who has not been a member of such association at any time from July 1, 1929, to September 1, 1953, shall receive credit for prior service as provided by ORS 237.081 upon payment prior to December 1, 1953, to the board by such teacher of such contributions as would have been deducted from his salary from July 1, 1946, to the date of becoming a member of this system if he had become a member of this system on July 1, 1946, and the school district by which said teacher is employed shall transmit to the board, at such time as the board designates, such sums as the school district would have been required to transmit under the provisions of ORS 237.081 if such teacher had become a member of this system on July 1, 1946, and, upon such payments, such teacher shall be deemed to have been a member of

the system established by this chapter for the purposes of ORS 237.001 to 237.315 continuously from July 1, 1946.

(b) Notwithstanding paragraph (a) of this subsection, an employee who is a member of, or eligible for membership in, an association established pursuant to ORS chapter 239 shall become a member of the system established by this chapter if he has separated, for any reason other than death or disability, from all service entitling him to membership in the system of the association, and he shall receive credit under ORS 237.001 to 237.315 for past service during the time he was a member of an association established pursuant to ORS chapter 239 upon payment to the board of all amounts in his individual account established pursuant to ORS chapter 239. Upon such payment by the employe the school board

which previously employed him shall pay to the board such sums as may be determined by actuarial computation to fund the employe's past service credits. The school board may, with the consent of the board, make payment in three equal annual installments.

(c) Notwithstanding paragraph (a) of this subsection, an employe who is a member of a retirement system established by a public employer prior to April 8, 1953, shall become a member of the system established by this chapter if he has separated from all service entitling him to membership in the retirement system established prior to April 8, 1953; but he shall receive no credit under ORS 237.001 to 237.315 for service during the time he is a member of, or eligible for membership in, the retirement system established prior to April 8, 1953.

Furthermore, if the employe has been separated for disability from service entitling him to membership in a retirement system established prior to April 8, 1953, and is receiving a disability benefit under such retirement system at the time he becomes a member of the system established by this chapter he shall not receive any benefit under ORS 237.001 to 237.315 for such disability.

(2) Any member of the Public Employes' Retirement System who, through the annexation of a political subdivision employing him or by change of employment, becomes the employe of another political subdivision which is participating in the Public Employes' Retirement System and has also a separate retirement system for its employes, shall remain a member of the Public Employes' Retirement System unless, within 60 days after the

effective date of the annexation or change of employment or April 8, 1953, he shall by written notice to the Public Employes' Retirement Board and to the administrative body of his new public employer elect to relinquish membership in the Public Employes' Retirement System and become a member of the separate retirement system of his employer, if eligible for membership in that retirement system, and he shall be so carried by his new employer. Immediately upon such annexation of any political subdivision or such change of employment, the new public employer shall inform such employe in writing of his right to exercise an election as in this section provided.

(3) A political subdivision (other than a school district) not participating in the retirement system established by

chapter 401, Oregon Laws 1945, as amended, which employs one or more employes, each of whose position requires 600 hours of service per year, or an agency created by two or more political subdivisions to provide themselves governmental services, which employs one or more employes, each of whose position requires 600 hours of service per year, may, through its governing body, notify the board in writing, that it elects to include its employes in the system hereby established. Such public employer may request the board to make a study and estimate of the cost of including it and its eligible employes, other than volunteer fire fighters, in the system, which the board thereupon shall cause to be made and the cost of which the employer shall bear. Upon completion of the study and estimate the employer may

apply for admission to the system, whereupon it shall begin to participate therein and its eligible employes other than volunteer fire fighters shall become members of the system. If the employer is an agency created by two or more political subdivisions to provide themselves governmental services and ceases thereafter to transmit to the board current service contributions for any of its eligible employes, the benefits based upon employer current service contributions to which such employes would otherwise be entitled shall be reduced accordingly.

(4) Except as subsection (7) of this section provides otherwise with reference to volunteer fire fighters, no employe whose position with one public employer or concurrent positions with two or more public employers normally require less

than 600 hours of service per year may become a member of the system.

(5) No inmate of a state institution and no person enrolled full time in a state institution principally for purposes of training, even though he received compensation for services performed for the institution, may become a member of the system.

(6) If he has not reached the age of 65 years, a person holding an elective office or an appointive office with a fixed term or an office as head of a department to which he is appointed by the Governor may become a member of the system by giving the board written notice of his desire to do so within 30 days after he takes office or, in the event that he is not eligible to become a member of the system at the time he takes the office, within 30 days after he

becomes so eligible. Membership so established shall not be discontinued during the appointive or elective term of the officer except upon his separation from service.

(7) A public employer employing volunteer fire fighters may apply to the board at any time for them to become members of the system. Upon receiving the application the board shall fix a wage at which, for purposes of ORS 237.001 to 237.315 only, they shall be considered to be employed and which shall be the basis for computing the amounts of the contributions which they pay into, and of the benefits which they and their beneficiaries receive from, the fund; and if the wage so fixed is satisfactory to the employer, shall include the fire fighters in the system.

(8)(a) In the event that an employe

enters the service of a public employer which is participating in or later begins to participate in the system and in the event that at the time he enters that service or at the time that the employer begins to participate in the system he has commenced to purchase and is continuing to purchase a retirement annuity, if the employer deems the annuity adequate for the purposes of ORS 237.001 to 237.315 it may enter into an agreement with him and the board pursuant to which he may be exempted from contributing to the Public Employes' Retirement Fund, and, if no public funds are being used to purchase the annuity or a corresponding pension, the employer, in lieu of the contributions which it otherwise would make to the fund on his account, may make contributions toward the cost of purchasing the annuity. Such

employe otherwise shall be subject to the provisions of ORS 237.001 to 237.315, except that neither he nor any person claiming under him shall receive any payments from the retirement fund as service or disability allowance.

(b) An employe who enters into an agreement under paragraph (a) of this subsection may elect at any time thereafter to start to participate in the system by giving writtten notice of his desire to participate to the board and to his employer. The employe shall receive no credit in the system for any service rendered to his employer during the period during which he was exempted from contributing to the fund under the agreement, but the employe shall be considered to have completed the six months' service required for membership in the system. When the employe starts

to participate in the system his employer shall start to contribute to the fund on his account in the same manner as the employer contributes on the account of other employes who are members of the system and his employer shall stop making contributions toward the cost of purchasing the retirement annuity.

(9)(a) All new appointees in the Federal Cooperative Extension Service or in any other service in which participation in the Federal Civil Service retirement program is mandatory, who receive a federal appointment on or after July 1, 1955, may participate in the Public Employes' Retirement System only by giving written notice of their election to so participate to the Public Employes' Retirement Board within six months after the effective date of their appointment.

(b) All persons employed by the Federal

Cooperative Extension Service or by any other service in which participation in the Federal Civil Service retirement program is mandatory, who are under federal appointments as of July 1, 1955, and who are members of the state retirement system, shall continue such membership unless, prior to February 1, 1956, they give written notice to the Public Employes' Retirement Board of their desire to cancel their membership.

(c) Any person who is a member of the Public Employes' Retirement System, who, on or after July 1, 1955, is employed by the Federal Cooperative Extension Service or by any other service in which participation in the Federal Civil Service retirement program is mandatory, and who is given a federal appointment, shall continue such membership in the Public Employes' Retirement System

unless, within six months after the effective date of the appointment, he gives written notice to the Public Employes' Retirement Board of his desire to cancel his membership.

(d) A cancellation of membership under paragraph (b) or (c) of this subsection terminates membership in the Public Employes' Retirement System and cancels the right to any benefits from, or claims against, that system. Such cancellation prevents the withdrawing member from claiming thereafter any credit for any service performed before the cancellation. Upon receipt of a notice of cancellation, the Public Employes' Retirement Board shall refund to the withdrawing member, regardless of his age, his account balance in the retirement fund.

O.R.S. 237.121

Voluntary retirement. (1) A police officer or fireman who is a member of the system and attains the age of 50 or any other employe who is a member of the system and attains the age of 55 shall be retired upon his written application to the board on a reduced service retirement allowance which shall be the actuarial equivalent of the service retirement allowance at the compulsory retirement age provided for in ORS 237.147.

(2) Notwithstanding subsection (1) of this section and subparagraph (B) of paragraph (b) of subsection (2) of ORS 237.073:

(a) A police officer or fireman who is a member of the system and attains the age of 55 shall be retired upon his written application to the board on a service retirement allowance including, without

actuarial reduction, the same current service pension and prior service pension provided for in ORS 237.147.

(b) An employe other than a police officer or fireman who is a member of the system and attains the age of 60 shall be retired upon his written application to the board on a service retirement allowance including, without actuarial reduction, the same current service pension and prior service pension provided for in ORS 237.147.

O.R.S. 237.129

Compulsory retirement age. (1) A police officer or fireman who is a member of the system and who has attained the age of 60 years shall be retired from service and thereafter, except as ORS 237.001 to 237.315 otherwise provide, the date of his retirement shall be the first day of

the calendar month next succeeding the one in which he attains that age.

(2) Any school district employe or any dean, associate dean, assistant dean, professor, assistant professor, associate professor, instructor, associate instructor, assistant instructor or associate employed by the State Board of Higher Education who is a member of the system and who has attained the age of 65 years shall be retired from service at the end of the school year in which he attains the age of 65 years and thereafter, except as ORS 237.001 to 237.315 otherwise provide, the date of his retirement shall be the first day of the next succeeding school year.

(3) Except as otherwise provided in subsections (1) and (2) of this section, any employe who is a member of the system and who has attained the age of 65 years

shall be retired from service and thereafter, except as ORS 237.001 to 237.315 otherwise provide, the date of his retirement shall be the first day of the calendar month next succeeding the one in which he attains that age.

O.R.S. 237.133(1)

Employment of persons beyond retirement age; mandatory retirement age. (1)(a) An employe who is a member of the system and reaches the age of compulsory retirement may submit a request in writing to the employer to be continued in service beyond the age of compulsory retirement. The administrative head of his employer may retain such employe beyond the age of compulsory retirement, if the administrative head determines, and states in a written notice to the employe, the reason that continued

service after reaching the retirement age would be in both the employer's interest and the public interest. A copy of such notice shall forthwith be transmitted to the board. No employe who is a member of the system shall be continued in service under this subsection after he reaches the age of 70 years.

(b) No employer or administrative head thereof shall adopt or enforce any general policy that all its employes affected by this subsection shall be or shall not be continued in service; but each employer shall make its decision upon the merits of the case of each individual employe affected.

(c) Any employe continuing in employment past compulsory retirement age as provided in this subsection may be retired at any time after reaching compulsory retirement age and prior to

reaching the age of 70 years if the administrative head of his employer determines, and states in a written notice to the employe and the board, the reason that continued service would not be in either the employer's interest or the public interest. Retirement under this paragraph is not subject to appeal. The continuance of any employe in employment past compulsory retirement as provided in this subsection shall be reviewed annually by the administrative head of his employer until the employe reaches the age of 70 years.

(d) In addition to the other requirements of this subsection, the retention of a state employe in the classified service beyond the age of compulsory retirement by an agency of the State of Oregon shall require the approval of the Administrator of the

Personnel Division of the Executive Department. Such approval may be granted only if:

(A) Certification for a replacement had been sought from the Personnel Division by the administrative head of the employer not less than three months prior to the date of compulsory retirement, and continuous recruitment for such replacement was conducted without, in the judgment of the Administrator of the Personnel Division, any satisfactory replacement being found; or

(B) The retirement of the state employe would cause extraordinary and excessive costs to be incurred or irreparable damage done to the completion of a defined specific project with an ascertainable termination date.

O.R.S. 237.147

Service retirement allowance at compulsory retirement age. Upon retiring from service on account of superannuation at compulsory retirement age a person who is a member of the system shall receive a service retirement allowance which shall consist of the following annuity and pensions:

(2)(a) A life pension (nonrefund) provided by the contributions of his employers, which pension, subject to paragraph (b) of this subsection shall be:

(A) For service as a police officer or fireman, 1.35 percent of his final average salary multiplied by the number of years of his membership in the system as a police officer or fireman before he reaches the age of compulsory retirement for a police officer or fireman.

(B) For service as a member of the

Legislative Assembly, 1.35 percent of his final average salary computed on the basis of calendar years before the date of his retirement instead of calendar years before he reaches the age of compulsory retirement, multiplied by the number of years of his membership in the system as a member of the Legislative Assembly, including those years of service as a member of the Legislative Assembly after he reaches the age of cumpulsory reirement for other than a police officer or fireman.

(C) For service as a legislative employe as defined in subsection (1) of ORS 237.095, one percent of his final average salary, computed on the basis of calendar years before the date of his retirement instead of calendar years before he reaches the age of compulsory retirement, multiplied by the number of years of his

membership in the system as a legislative employe, including those years of service as a legislative employe after he reaches the age of compulsory reirement for other than a police officer or fireman.

(D) For service as other than a police officer, fireman, member of the Legislative Assembly or legislative employe, one percent of his final average salary multiplied by the number of years of his membership in the system as other than a police officer, fireman, member of the Legislative Assembly or legislative employe before he reaches the age of compulsory retirement for other than a police officer or fireman.

(b) A pension under this subsection shall be at least the actuarial equivalent of the annuity provided by the accumulated contrubutions of the person.

(c) As used in this subsection, "number

of years of his membership" means the number of full years plus any remaining fraction of a year. Except as otherwise provided in this paragraph, in determining a remaining fraction a full month shall be considered as one-twelfth of a year and a major fraction of a month shall be considered as a full month. Membership of a school district employe, an employe of the State Board of Higher Education engaged in teaching or other school activity at an institutuion of higher educaion or an employe of the Children's Services Division, the Corrections Division, the Mental Health Division or the State Board of Education engaged in teaching or other school activity at an institution supervised by the board or division, for all portions of a school year in a calendar year in which the district school, institution of

higher education or school activity at an institution so supervised in which he is employed is normally in session shall be considered as a full one-half year of membership. The number of years of membership of an employe who received a refund of his contributions as provided in subsection (2) of ORS 237.976 is limited to the number of years after the day before the date on which he received the refund. The number of years of membership of an employe who is separated, for any reason other than death or disability, from all service entitling him to membership in the system, who withdraws the amount credited to his account in the fund during his absence from such service and who thereafter reenters the service of an employer participating in the system but does not repay the amount so withdrawn as

provided in ORS 237.001 to 237.315, is limited to the number of years after the day before the date of so reentering.

ORS 237.251

Public Employes' Reitrement Board; creation; general powers and duties. (1) The governing authority of the system shall be a board of five persons appointed by the Governor and known as the Public Employes' Retirement Board. Except as otherwise provided in ORS 237.255, the term of each appointee shall be four years.

(2) The board shall have:

(a) The powers and privileges of a corporation, including the right to sue and be sued in its own name as such board, and

(b) The power and duty, subject to the limitations of ORS 237.001 to 237.315, of

managing the system.

(3) The Board:

(a) Shall, at its first meeting each year, designate one of its members to serve as chariman of the board for the remainder of the year until his successor is designated and takes that office;

(b) Shall arrange for actuarial service for the system;

(c) Shall employ an executive secretary as hereinafter provided;

(d) Shall create such other positions as it deems necessary to sound and economical administration of the system, which positions the executive secretary shall fill by appointment; and

(e) Shall, with the approval of the Director of the Executive Department, and as otherwise provided by law, fix the salaries of all persons employed for purposes of administering the system.

(f) Shall publish and distribute to all employer and employe members of the system an annual report including a summary of investments of moneys in the fund, investment earnings, significant legislative or administrative changes in the system and other pertinent information on the operation of the system for the preceding year.

(4) The board established by this section shall succeed to all the duties and perogatives of the Public Employes' Retirement Board creatd by chapter 401, Oregon Laws 1945, in relation to the Public Employes' Retirement Fund, and in addition shall perform all duties required of it by ORS 237.950 to 237.980, in regard to moneys payable to or from such fund.

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I served the foregoing Plaintiff-Petitioner's Petition for Writ of Certiorari on the following attorneys on October 26, 1981, by mailing to said attorneys (2) true copies thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to said attorneys at their last known address, and deposited in the post office at Portland, Oregon, on said day:

DAVID FROHNMAYER, Attorney General
WILLIAM HOELSCHER, Assistant Attorney General and Counsel
100 State Office Building
Salem, Oregon 97310
Attorneys for Defendant-Respondents

Dated: October 26, 1981.

B. L. Bouneff, Of Attorneys for Plaintiff-Petitioner